

Rule Making: Utah Style

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2007 AWSE Spring Workshop

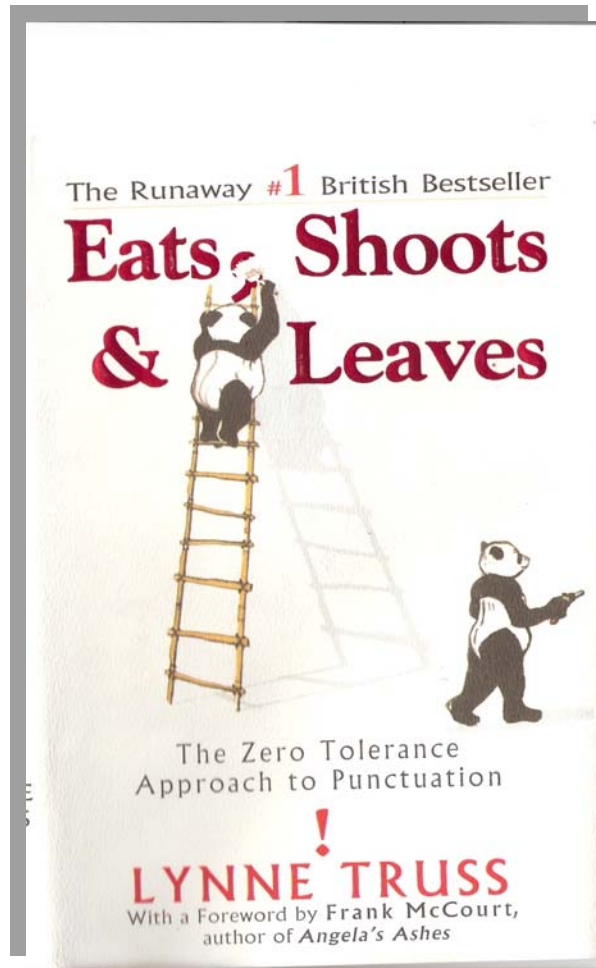
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Sun Valley, Idaho

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Why me?



- Recent experience with Utah's rulemaking process
- Designated Division "Grammar Geek"

*"Eats, Shoots & Leaves:
The Zero Tolerance
Approach to
Punctuation"*

The Punch Line...



- **Panda:** a mammal classified in the bear family, native to parts of China. Eats,
shoots and leaves.

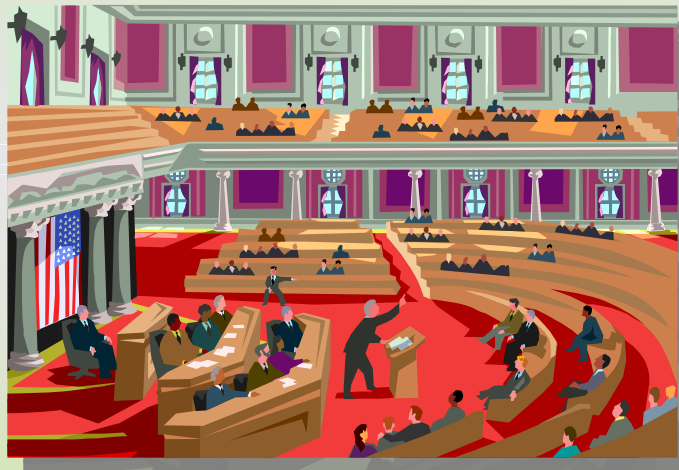
What's the Point?

- **Language** is the currency of government.



What's the Point?

- Legislatures give us our marching orders in carefully crafted **language**.



What's the Point?

- Courts interpret statutes and set boundaries using specific **language**.



What's the Point?

- When executive branch agencies adopt administrative rules, the **language** we create becomes the muscle on the skeleton provided by statutes.



What's the Point?

- Otherwise competent engineers often struggle with the **language** in rules.



What's the Point?

- If rule making is not done well, we can make our own jobs harder!



Utah Administrative Rulemaking

- Administered by:
 - Dept. of Administrative Services (DAS)
 - Division of Administrative Rules (DAR)
- Authority: **§ 63-46 Utah Code Ann. (2006)**
 - ❖ “Utah Administrative Rulemaking Act”



Utah Administrative Rulemaking

- Six phases in rulemaking:
 1. Authorization
 - Constitution
 - Statute (May/Shall)
 - Court Order
 2. Pre-Proposal
 - Consult
 - Fiscal impact
 - Draft



Utah Administrative Rulemaking

- Six phases in rulemaking (cont'd):
 3. Proposal
 - File with DAR
 - Notice / publication
 - DAR review
 4. Comment Period
 - 30 – 113 days
 - May include hearing



Utah Administrative Rulemaking

- Six phases in rulemaking (cont'd):
 5. Adoption
 - > 7 days after comment period closes
 - Agency notice to DAR of effective date
 6. Enforcement
 - Agency responsibility



Utah Administrative Rulemaking

- **§ 63-46a-3.5. Rules having the effect of law.**
- (2) An agency's written statement that is made as a rule in accordance with the requirements of this chapter **is enforceable and has the effect of law.**



Recent experience / work product: The Utah Enforcement Statutes

- **§ 73-2-25:** State Engineer enforcement powers
- **§ 73-2-26:** Administrative penalties
- **§ 73-2-27:** Criminal penalties
- **§ 73-2-28:** Costs and fees in civil actions



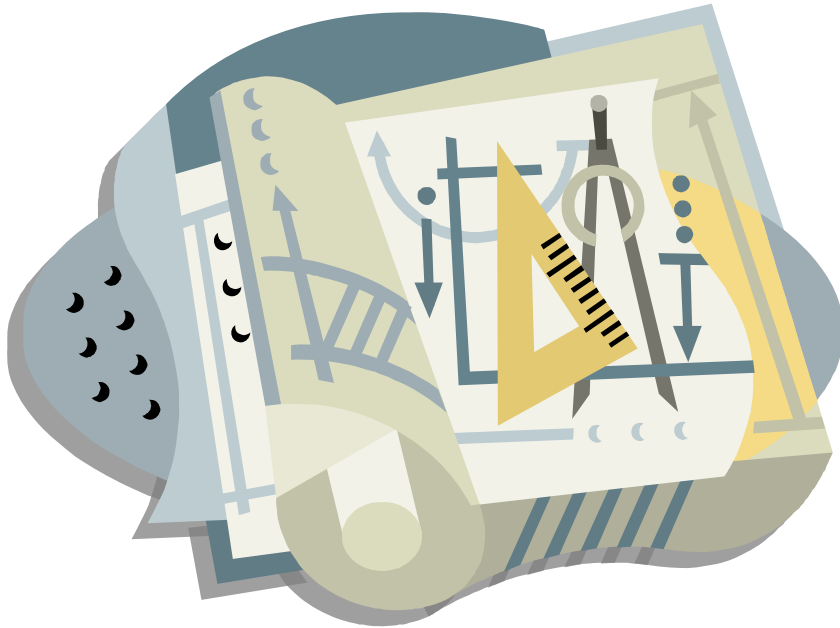
The Utah Enforcement Statutes

§ 73-2-25 (3)

“...the state engineer
shall make rules
necessary to enforce
an initial order.”

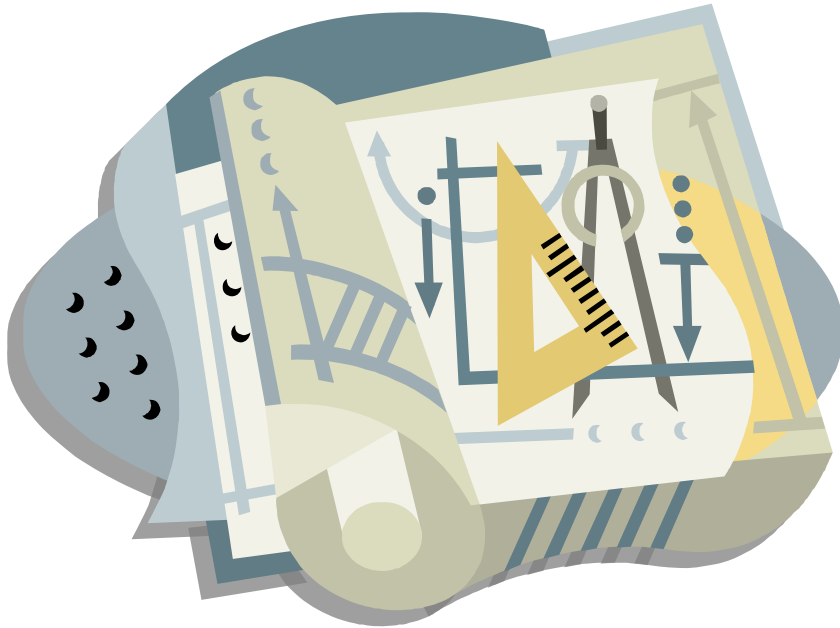


The 2005 Administrative Rule



- **Rule R655-14:**
“Administrative Procedures for Enforcement Proceedings Before the Division of Water Rights”

The 2005 Administrative Rules



- Authorizing statute
 - About 2 pages
- Administrative Rule
 - About 31 pages

2006 Amendments to Rules

- Section R655-14 was amended in December of 2006.
 - “Housekeeping” changes:
 - Add/Clarify definitions, correct grammar, etc.
 - Remove conflict with statute (court appeal)
 - Introduction of new Subsection R655-14-14:
“Procedures for Determining the Amounts of Administrative Penalties, Enforcement Costs and Water Replacement.”

Statutory guidance : § 73-2-26 (2)

Before imposing a fine or ordering replacement..., the state engineer shall consider:

(a) the value or quantity of water unlawfully taken, including the cost or difficulty of replacing the water;

(b) the gravity of the violation, including the economic injury or impact to others;

(c) whether the person subject to fine or replacement attempted to comply with the state engineer's orders; and

(d) the violator's economic benefit from the violation

Subsection R655-14-14

- “Base” administrative penalty based on economic benefit:
 - Direct Benefit, or
 - Avoided Cost
- Multiplied by a factor based on:
 - Knowing / Unknowing
 - Injury to others
 - Duration of violation
 - Efforts to comply

- “Penalty Multiplier Tables” for:
 - Water Rights
 - Direct Benefit
 - Avoided Cost
 - Stream Alteration
 - Dam Safety
 - Penalty Reduction

CONCLUSIONS

- Rulemaking authority is delegated legislative authority. Be careful!
- Rules, properly drafted and enacted have important administrative functions:
 - Agency personnel have clear direction for navigating complex processes;
 - Citizens receive guidance and know what to expect from a government agency;
 - Courts often give deference to standards and procedures established by a rigorous and public rulemaking process.

CONCLUSIONS

Poorly crafted rules are seen as “red tape” that entangles and frustrates both the public and those working in our agencies.

Although rulemaking can be difficult and tedious, if well done, the result will be an effective and useful tool.



Questions? / Comments!



It's over !!

